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ABSTRACT

This outline is part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002. It covers a presentation on changes in the law and social structure of South Africa. As an outline, it briefly touches upon a number of topics, but focuses mainly on South Africa's emerging "final" Constitution, offering background, legal explanations, and recommendations. The outline addresses the following topics: (1) constitutional and statutory provisions regarding race, age, and disability; (2) The South African Schools Act of 1996; (3) the Employment Equity Act of 1998; (4) the National Education Policy Act of 1996; (5) labor relations, including teachers' rights to strike and to seek collective bargaining; (6) freedom of expression; (7) the right to freedom of religion, belief, and opinion; and (8) education policy regarding religious observances and religious instruction in schools. (Contains 85 footnotes, some with references.) (WFA)

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Balancing Human Rights and Civil Liberties in An Emerging Democracy:

Education Law, Policy and Practice in South Africa

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OUTLINE

BALANCING FUNDAMENTAL HUMAN RIGHTS AND CIVIL LIBERTIES IN AN EMERGING DEMOCRACY: EDUCATION LAW, POLICY AND PRACTICE IN SOUTH AFRICA

Paper to be read at the 48th annual conference of ELA, New Orleans, November 2002 - Johan Beckmann (A), Simeon Maile (B), Willie van Vollenhoven (C) and Rika Joubert (D) (University of Pretoria, South Africa)

INTRODUCTION

It is an over-used and under-appreciated tired expression that South Africa experienced a miracle in 1994 when a bloodless coup saw the installation of the country's first truly democratically-elected government, the commencement of its so-called interim Constitution[1] and the Rainbow Nation[2] came into being. Like the next version of the Constitution (also called the final Constitution)[3], the interim Constitution contained a Bill of Rights (Chapter 3)[4] which entrenched a number of fundamental rights such as the rights to equality; life; education; privacy; freedom of belief; religion and opinion; freedom of expression and certain labour rights.

The Postamble of the interim Constitution describes this version of the Constitution as a "...a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex". The future to which the interim Constitution provides a bridge is defined in terms of the pursuit of and adherence to certain founding values in the final Constitution:

> South Africa is a democratic state founded on the following values:[5]
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

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[1] Act 200 of 1993.

[2] A phrase used by the first President of the new dispensation, Mr Nelson Mandela, in his first address to the nation after his installation on 27 April 1994.

[3] Act 108 of 1996.

[4] Chapter 2 of the final Constitution.

[5] Section 1.

Using some poetic licence, one might say that the other side of the bridge, for South Africans, implies "...the full and equal enjoyment of all rights and freedoms"[6] guaranteed by the Constitution. Until and unless all South Africans arrive on the other side of the bridge there will be tensions between the rights and freedoms to which people aspire and the quality of enjoyment of rights that they have real and practical access to. This paper will explore some of these tensions regarding: A) equality and non-discrimination on the basis or race, age and disability; B) labour rights; C) freedom of expression and D) religious rights.

The discussion will take cognisance of three important provisions of the final Constitution in this regard:

- The founding values enunciated in section 1
- The provision in section 7(2) that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights."
- The provisions in sections 8(10 and (2) that:
    - (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
    - (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

An attempt will be made to indicate if and to what to what extent progress has been made to resolve possible tensions in regard to the rights listed above. In the discussion reference will be made to law, policy and practice.

A RACE, AGE AND DISABILITY

Constitutional and statutory provisions

The final Constitution of the Republic of South Africa, Act No 108 of 1996 (hereinafter CRSA)

Section 9 (the equality provision) of CRSA is a crucial provision on race, age and disability in South African law. It provides as follows:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

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[6] Section 9(2) of the final Constitution.

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(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

One can infer that, in terms of CRSA, equality means that:

- The equal worth of people is protected by the right to equality[7]
- Everyone has the right to equal protection and benefit of the law
- Everyone has the right not to be discriminated against unfairly (directly or indirectly) by the state on a number of listed and analogous grounds
- Everyone has the right not to be discriminated against unfairly by any person on a number of listed and analogous grounds.[8] De Groof & Lauwers[9] aver that "[O]nly objective, sensibly and reasonably different treatment is permitted.
- People who have been discriminated against previously have the right to be treated differently by legislative and other measures in order to advance or protect them (section 9(3)). This provision refers to what is commonly known as affirmative action.
- Everyone has a right to free and full and equal enjoyment of all rights and freedoms
- Race, age and disability are specifically mentioned as grounds on the basis of which there may be no unfair discrimination against anyone.

Section 29 of CRSA protects everybody against discrimination in the field of education.[10] It provides as follows:

(1) Everyone[11] has the right-

(a) to a basic education[12], including adult basic education; and

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[7] Malherbe, EFJ. 2001. Human rights in education (Draft of a chapter of a book to be published in 2003), p 35.

[8] Malherbe (*Ibid*) comments that the provision recognises that people may be treated differently for very valid reasons and therefore does not prohibit all discrimination, but only unfair discrimination. He also says that the Constitutional Court has defined discrimination as unequal treatment that impairs human dignity, or affects a person in a comparably serious manner.

[9] De Groof, Jan & Lauwers, Gracienne. 2001. Education policy and law: The politics of multiculturalism in education. **Perspectives in Education**, 19(4):47 - 63. Also see in general about equality Malherbe, EFJ. 2002. Advancing social change: Recent human rights developments in South Africa. Paper read at the Oxford Round Table on Civil Rights / Human Rights, 11- 16 August 2002, Oxford, pp. 6 – 14.

[10] It goes without saying that the drafters of CRSA had access to and used the various international human rights instruments relevant to education.

[11] This word rules out unfair discrimination on the basis of race, disability and age.

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

Section 29(3) of CRSA provides for the establishment of private (independent) educational institutions and provides yet another safeguard against unfair discrimination on the basis of race:

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

(a) do not discriminate on the basis of race ...[13]

Promotion of Equality Act, No 4 of 2000 (hereinafter Equality Act)

The Equality Act deals entirely with the promotion of equality.[14] The objects of this Act include the following:

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[12] Malherbe *op cit* p 26 comments on the fact that this section, unlike section 32 of the Interim Constitution, does not include a right to equal access to educational institutions. He believes that such a provision is unnecessary as section 9 (the equality clause) provides adequate protection in this regard. Malherbe also comments that this section does not guarantee absolute equality but educational opportunities in accordance with a person's abilities. He believes that reasonable and justifiable admission requirements based on performance, language and other requirements may be imposed.

[13] Malherbe, *op cit*, p 28 contends that this section clarifies many uncertainties of the Interim Constitution. The limitations of the grounds on which such institutions (including higher education institutions) can be established have now been removed. Such institutions may be established on reasonable grounds and for reasonable purposes provided that certain conditions that are specified are met.

[14] The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000. The long title of this Act provides that its aim is to give effect to section 9 (the equality clause) read with item 23 (1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith. The said item 23(1) reads that national legislation envisaged in sections 9 (4), 32 (2) and 33 (3) of the new Constitution

(a) to enact legislation required by section 9 of the Constitution [the "equality clause"];

(b) to give effect to the letter and spirit of the Constitution, in particular-

...

(iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

(iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

...

(d) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

(e) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(f) ...

(g) to provide remedies[15] for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;

(h) to set out measures to advance persons disadvantaged by unfair discrimination.

The South African Schools Act, 84 of 1996 (hereinafter SASA)

The preamble of SASA states, among others, that this Act is enacted because South Africa requires a new national system for schools which will redress past injustices in educational provision, ... combat racism and sexism and all other forms of unfair discrimination and intolerance ...Section 6(3) of SASA provides that no form of racial discrimination may be practised in implementing policy determined under this section [language policy].

The Employment Equity Act, 55 of 1998 (hereinafter Equity Act)

Equity Act

The Employment Equity Act, 55 of 1998, in its preamble, recognises that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market [including education]; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. The preamble declares that this Act is enacted among others to:

- promote the constitutional right of equality and the exercise of true democracy;
- eliminate unfair discrimination in employment;
- ensure the implementation of employment equity to redress the effects of discrimination.

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must be enacted within three years of the date on which the new Constitution took effect. The commencement date of CRSA is 4 February 1997.

[15] *E.g.* an order for the payment of damages arising out of unfair discrimination.

According to section 2 of the Equity Act the purpose of this Act is to achieve equity in the workplace by:

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

Section 5 of the Equity Act provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6 prohibits unfair discrimination in the workplace and provides that:

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Section 13 of this Act touches on affirmative action and provides that certain categories of employers ("designated employers") must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act. In terms of section 1 of the Act "designated employer" includes an organ of state as defined in section 239 of the Constitution [including national and provincial education departments].

Section 15 deals with affirmative action measures and provides that:

(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

(2) Affirmative action measures implemented by a designated employer must include-

(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

(b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

(c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

d) subject to subsection (3), measures to-

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.

The National Education Policy Act, 27 of 1996 (hereinafter NEPA)

Section 3(1) of this Act provides that the Minister of Education shall determine national education policy in accordance with the provisions of the Constitution and this Act. Section 4 lists directive principles of national education policy and provides that:

The policy contemplated in section 3 shall be directed toward:

(a) the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 2 of the Constitution, and in terms of international conventions ratified by Parliament, and in particular the right-

(i) of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever;

...

(c) achieving equitable education opportunities and the redress of past inequality in education provision, including the promotion of gender equality and the advancement of the status of women.

Discussion of tensions

Race

Malherbe[16] discusses section 29(2) of CRSA and points out that:

"This was the clause that nearly derailed the constitutional negotiations of the nineties and on which an uncomfortable compromise was reached. The essence of the crisis was that some parties tried to protect the existing separate schools for the different language groups by means of a constitutional right to single-medium schools, as opposed to the ANC's ideal of equal, non-racial education that would eradicate the injustices and disparities of the past. On the one hand, ... there was the fear that existing white schools would be overcrowded by pupils from other language and cultural groups. On the other hand, there was the suspicion that this fear was inspired by racism, and that a right to single-

[16] Op *cit*, pp 26 – 27.

medium institutions would perpetuate existing inequalities and would frustrate the redress of inequalities and the transformation of the education system".
Section 29(2) therefore reflects some tension and represents a compromise between individuals' rights to choose a language of education and the need to guard against unfair discrimination.

Admission policy for ordinary public schools[17]

This policy was promulgated in terms of section 3(4)(i) of NEPA and contains the following relevant items:

- The admission policy of a public school and the administration of admissions by an education department must not in any way unfairly discriminate against an applicant for admission (item 8)[18].
- The governing body of a public school may not administer any test[19] related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test (item 11).

Norms and standards for language policy in public schools[20]

Item IVA (2) of this policy comments on the fact that the inherited language-in-education policy in South Africa has been underpinned by racial and linguistic discrimination. Such policies have affected the access of learners to the system or their performance within it.

The policy (Item IVA(3)) says that the new policy is conceived of as an integral apart of the strategy to build a non-racial nation in South Africa. It is intended to help create an environment in which respect for languages other than one's own will be fostered.

National norms and standards for school funding (Norms and Standards)[21]

Items 39 and 40 of the Norms and Standards state that effecting redress and equity in school funding, with a view to progressively improving the quality of school education, within a framework of greater efficiency in organizing and providing education services, are matters of urgent priority for the Ministry of Education. The documents observes that, to achieve these objectives [the objectives stated in the

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[17] General Notice 2432 (Government Gazette 19377) of 19 October 1998.

[18] See section 9(3-4) of CSRA.

[19] This term is aimed at eliminating indirect unfair discrimination, e.g. where schools ostensibly test learners' proficiency in English or Afrikaans but the hidden aim is to exclude Black children. However, this item does not exclude the possibility of the provincial education department asking candidates for admission to undertake suitable tests with a view to placement e.g. in music schools

[20] Government Notice R1738 (Government Gazette 18546) of 19 December 1997.

[21] General Notice 2362 of 1998 (Government Gazette Vol. 400, No. 19347) of 12 October 1998

SASA preamble] in a systematic manner, requires new systems of budgeting and spending for schools.

Items 46 to 48 discuss the effect of existing official funding policies (1998). They comment that, ironically, given the emphasis on redress and equity, the funding provisions of the Act (SASA) appear to have worked to the advantage of public schools patronised by middle-class and wealthy parents [predominantly white]. The apartheid regime favoured such communities with high-quality facilities, equipment and resources. Vigorous fund-raising by parent bodies, including commercial sponsorships and fee income, have enabled many such schools to add to their facilities, equipment and learning resources, and expand their range of cultural and sporting activities. Since 1995, when such schools had been required to down-size their staff establishments, many had been able to recruit additional staff on governing body contracts, paid from the school fund. ... All too many schools in poor rural and urban working-class communities still suffered the legacy of large classes, deplorable physical conditions, and absence of learning resources, despite a major RDP [Reconstruction and Development Programme,[22] a National School Building Programme, and many other projects paid directly from provincial budgets. Yet the educators and learners in poor schools were expected to achieve the same levels of reaming and teaching as their compatriots.

The Norms and Standards point out that such contradictions within the same public school system reflect past discriminatory investment in schooling, and vast current disparities in the personal income of parents. Therefore the document [the Norms and Standards] addresses these inequalities by establishing a sharply progressive state funding policy for ordinary public schools, which favours poor communities.

Item 99 deals with a "resource targeting list" which will comprise all ordinary public schools in a specific province sorted by "need" or "poverty". Two equally weighted factors will be used to rank the schools:

A The physical condition, facilities and crowding of the school. This factor is weighted 50%.

B The relative poverty of the community around the school. This factor is weighted 50%.

Allocations will be made on a variable per learner basis that favours the poorer segments of the population. The neediest and largest schools will get priority in funding. The results of the application list will, to a large extent, benefit Black learners.

Case law

There have not been many court cases regarding race and education. Two cases stand out.

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[22] A government initiative which has apparently been discontinued and which did not meet with a great deal of success.

Matukane and Others v Laerskool Potgietersrus 1996 (3) SA 223 (T)

The, who were black persons, had at the beginning of 1996 applied to have their children enrolled at the respondent primary school (a state-aided public school as defined in the Northern Province School Education Act 9 of 1995), but their applications had been refused. The second and third applicants had made similar unsuccessful attempts at the beginning of 1995. The reason given for the refusal to admit the applicants' children was that the school was full. The school was an Afrikaans and English parallel-medium school, although the majority of pupils were Afrikaans-speaking.
Contending that the applicants' children had been refused admission on racial grounds in violation of s 8(2) of the Northern Province School Education Act and ss 8(2), 10, 24(a) and 32(a) of the Constitution of the Republic of South Africa Act 200 of 1993)the Interim Constitution), the applicants (the Member of the Executive Council of the Northern Province for Education, Arts, Culture and Sport being the fourth applicant) applied for an order declaring that the respondent might not, on grounds related to race, ethnic or social origin, culture, colour or language, refuse to admit any child; interdicting the respondent from refusing to admit any child on such grounds; and directing the respondent to admit the black children of the parents listed in an annexure to the notice of motion.

The Court found that the facts *prima facie* proved discrimination. The court held that the respondent could only escape the consequences of that finding if it established that discrimination did not exist or that such discrimination as did exist was not unfair (s 8(4) of the Constitution): it did not matter which of the forms of discrimination mentioned in s 8(2) of the Constitution was proved - should it be found that the applicants had failed to prove discrimination on purely racial grounds, the established facts undoubtedly proved discrimination on the grounds of ethnic or social origin, culture and language.

For the respondent it was contended, firstly, relying on ss 17, 31 and 32(c) of the Constitution read in the light of international law in regard to minority groups in a country, that discrimination on the grounds of ethnic or social origin, culture or language was not *per se* unfair. It was contended, secondly, relying on s 31(1) of the Educational Affairs Act (House of Assembly) 70 of 1988 and the regulations promulgated thereunder that the admission of children to the school was a matter in the control of the governing body and that the school's criteria for admission could only be amended in consultation with the school's parent community.

The court also held that the respondent had failed to establish that there was no unfair discrimination against black children: even if their applications for admission had been rejected because they had elected to receive their schooling through the medium of English, it would still constitute unfair discrimination. The court therefore granted the application.

Motala v University of Natal 1995 (3) BCLR 374 D

Malherbe[xxxix] discusses this case in the context of section 9(2) of CRSA that provides that, to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken. The corresponding provision in the Interim Constitution was the subject of a dispute in **Motala v University of Natal**.[xl]

In this case, an exemplary Indian student was refused admission into medical school in favour of a less meritorious African student in terms of an admission policy which limited the number of Indian students in order to make room for more African students. The court upheld the exclusion of the Indian student simply because it came to the conclusion that Africans were disadvantaged more than Indians under apartheid. This case established the precedent that some people could have been more disadvantaged than others in the disadvantaged group – in this case Black people were held to have been disadvantaged more than Indian people.

Practical issues

Reports on research reports and newspaper reports indicate quite clearly that the tension between the prohibition of unfair discrimination and what happens in practice is still strong.

Newspapers reported on incidents such as the following:

- White learners attacking Black learners (Bryanston: **The Star** 26 June 2000)
- A Black learner stabbing a White learner with a pair of scissors (Vryburg: **The Star** 18 October 2000 and **Beeld** 10 March, 13 May and 20 August 1999)
- Fighting between Black and White learners (Groblersdal: **The Star** 25 March 1999 and **Beeld** 21 January 2000)
- White parents sjambokking Black learners trying to keep them out of a school (Vryburg: **The Star** 18 October 2000 and **Beeld** 10 March, 13 May and 20 August 1999)
- School hostels which have either a majority of White or Black learners have been termed racist (Sabie: **Beeld** 4 August 2001)
- The level at which school fees were pegged was said to be aimed at barring Black learners from a school (Meyerton: **Beeld** 6 January 2000 and10 May 2001)

Research reports came to the following conclusions:

- **South African Human Rights Commission**. In October 1999 the South African Human Rights Commission (HRC) published a report on "Racism, racial integration and desegregation in South African public secondary schools". The document combined reports on research and the conference on racial integration in schools, held in March 1999. It found that there were myriad ways in which racism continued to plague schools. Almost two-thirds of the learners interviewed acknowledged that there had been incidents of racialism at their schools.

- **Human Sciences Council Report on deracialisation and migration of learners in South African schools: Challenges and implications, 2001.** This report departs from the point of view that statutory deracialisation in education has not guaranteed a smooth passage towards the realisation of successful school integration. The reports comments on a general inability of provincial departments, schools and communities to deal effectively with the change process in education. Examples of challenges remaining are:
    - racial conflict
    - cultural intolerances
    - daily migration of learners from "Black" townships to "White" suburban schools in search of better education, and
    - exorbitant school fees and transport fees that some parents have to meet.
- **Education Foundation Report on macro-indicators of racism in the schooling system (2001).** The report is an attempt to comply with a recommendation in the abovementioned HRC report[li] that racism in schools be addressed by monitoring existing legislation, policy and practices. This report provides relevant quantitative data on changes in the schooling system since 1994.

  As regards learner enrolment (access to schooling), the report points out that African learner enrolment increased by 1.2 million from 1991 to 1994 and by 702 315 from 1994 to 1997. White learner enrolment decreased by 21% over the same period. In 1997 only three provinces had a fairly even split between uniracial and integrated schools namely Gauteng (48% integrated schools), Northern Cape (56% integrated schools) and Western Cape (46% integrated schools). Six provinces had more than 70% uniracial African schools (Eastern Cape - 90%, Free State - 75%, KwaZulu-Natal - 86%, Mpumalanga - 77%, Northern Province (now Limpopo) - 95% and North West - 74%. It is only in the Northern Cape (1%) and the Western Cape (13%) where there were uniracial White schools (1% for the country).

  According to the report, 17% of African Children in the age group 7-18 (school-going age) were out of school in 1996. In the case of White children the figure was 9%.

Age

The Minister of Education published age requirements for admission to an ordinary public school in terms of section 3(4)(i) of NEPA and section 5(4) of SASA.[23] Item 4 of this notice provides that a learner must be admitted to Grade 1 if he or she turns seven on that calendar year. A learner who is younger than this age may not be admitted to Grade 1. Item 2 of the notice has the effect that a learner who is older than the number of the grade plus 6 years cannot be admitted to a particular grade, for example a learner who is older than 7 years may not be admitted to Grade 1 and one is

[23] *Government Gazette*, Vol. 400, No. 19377, 19 October 1999, Notice 2433 of 1998.

older than 18 years may not be admitted to Grade 12. This creates *prima facie* discrimination against those younger than 7 who may be ready for school and against those who exceed a certain upper age limit (even if there are good political, social and economic reasons why they are "over age"). Bertelsmann[24] points out that there are no criteria for determining whether learners who exceed the Age norm by more than 3 years should be allowed to continue in school. This would seem to create, therefore, differential treatment of those who are under and over the set age limits.

The Minister published an identical item 3 on age requirements for admission to independent schools in 2000 in terms of section 3(4)(i) of NEPA.[25] This notice was meant to achieve uniformity between public and independent schools.

The independent school requirements were challenged in the Transvaal High Court and on 15 January 2001 Coetzee J declared the notice to be invalid and unconstitutional and authorised King David Primary School to enrol Talya Harris[26] Grade 1. The Minister of Education appealed to the Constitutional Court and Sachs J handed down judgment in Doreen Harris v Department of Education (CCT 13/01) on 5 October 2001.

Judge Sachs summarised Judge Coetzee's findings in the Transvaal High Court as follows:

- The Minister's notice discriminated unfairly against Talya and similarly situated children, was unjustifiable and violated section 9 of the CRSA (unfair discrimination on the basis of age).
- The Minister's actions (requiring Talya to repeat her final pre-primary year) was against section 28(2) of CRSA (the paramountcy of a child's best interests in any matter concerning a child).
- The Notice was *ultra vires* the powers of the Minister – the Minister was authorised to determine national policy on age of admission but not empowered to make law.
- The Minister usurped a provincial executive power when he stated in the notice that the age requirements had to be applied as an additional prerequisite for the registration of independent schools.[27]

Judge Sachs declined to pronounce on the correctness of Judge Coetzee's finding that the notice was unconstitutional. He did find, however, that the Minister had exceeded the powers conferred on him by section 3(4) of NEPA and had infringed the principle of legality. The appeal was therefore

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[24] fn 22.

[25] *Government Gazette*, No 20911 of 18 February 2000, Notice 647 of 2000.

[26] Talya Harris turned 6 on 11 January 2001 and was part of a group of children who spent three years in King David Pre-primary School being prepared for entry to the primary school in 2001. Her mother challenged the validity of the Minister's notice on independent schools.

[27] Item 5 of the Notice.

dismissed with costs. The Minister has subsequently amended the requirements by inserting an item 4(A)[28] which reads as follows:

> Despite paragraph 4, the Head of Department may allow a learner who wants to be admitted to grade 1, but who will not be turning 7 during the year of such admission, to be admitted at a lower age. This deviation by the Head of Department may only occur if, in the opinion of the Head of Department, reasonable grounds exist that such a learner is, based on educational principles, school ready for grade 1 and it is in the best interest of such a learner to be admitted as an underage learner to a public school. The parent of the learner must show that the refusal to be admitted to a school will have a detrimental effect on the child's development.[29]

Another instance of *prima facie* discrimination on the basis of age is contained in section 10(1)(a) of the Employment of Educators Act (EEA), 76 of 1998 which provides that:

(1) (a) Subject to the provisions of this section, an educator shall have the right to retire, and shall be so retired, on the day on which the educator attains the age of 65 years.

It would be very surprising if this provision were not challenged sooner rather than later on the grounds of unfair discrimination on the basis of age.

Disability

Despite provisions such as the following learners with disabilities (special educational needs) do not enjoy access to a system which will ensure equal educational opportunities for them:

- [D]iscrimination means any act or omission ... which directly or indirectly –
  (a) imposes burdens, obligations or disadvantage on; or
  (b) withholds benefits, opportunities or advantages from,
  any person on one or more of the prohibited grounds [among others disability].[30]
- Subject to section 6 [of the Equality Act] no person may unfairly discriminate against any person on the ground of disability, including -

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[28] *Government Notice* No 1356 of 11 December 2001.

[29] It is interesting that the Minister still regards such a learner as underage while the learner has been admitted. This seems to be a *contradictio in terminis*. When the case was heard in the Transvaal High Court, counsel for the minister had adduced that opening public schools to learner younger than 7 would clog up the system and that resources in this regard were inadequate (see Bertelsmann (2001) *Comments* in **Perspectives in Education**, 19(4):29-33. Ironically, in his 5th report to the president on the state of education in the provinces, the Minister states that the number of learners aged six who applied for admission was "insignificant." (p 1) except for two provinces where the significant numbers did not seem to create any significant challenges to the system.

[30] Section 1 of the Equality Act.

(a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society

(b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

(c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such person.[31]

- The second item in the illustrative list of unfair practices (namely in the education sector) in the Schedule to section 29 of the Equality Act labels the following, among others, as unfair practices –
    - Unfairly excluding learners from educational institutions, including learners with special needs.

The practical situation speaks of significant dissonance and tensions between provisions or rights and practice, for example:

- 280 000 disabled children younger than 16 years are not in schools or colleges[32] - enough to fill 948 schools with approximately 330 learners each
- In the past, education for learners with special needs were provided on a racial best with the bet "human, physical and material resources" reserved for whites[33]
- Race and disability were both sued as segregating criteria[34]
- The government proposes short-term, medium-term and long-term steps to effect the inclusion (as opposed to mainstreaming or integration) of all learners with special education needs[35]

CONCLUSION

It is clear that there are many provisions and ideals on and about equality regarding race, age and disability as they apply in education. It is also abundantly clear that there will be significant contestation resulting from tensions between reality and ideal before equality in terms of race, age and disability is achieved.

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[31] Section 9 of the Equality Act.

[32] *Education White Paper 6 Special Needs* Education – Building an Inclusive Education and Training System. Pretoria: Department of Education, July 2001, p 4.

[33] *Ibid.*

[34] P 9.

[35] Pp 42 – 43 indicate that the long-term steps could take until 2121 to implement.

B LABOUR RELATIONS

Introduction

In 1994 the incoming government in South Africa inherited militant trade unions which acted as social agents for achieving democracy and which had considerable influence in party politics and in areas of decisions making in policy matters.[36]

The militancy of trade unions had simmered during the struggle against apartheid and the unions included social and economic issues in their agendas.[37] The engagement in diverse social, economic and political issues, in addition to traditional purposes of improving conditions of service, led to a rise in strikes. In the 1990s there was a proliferation of labour disputes,[38] mainly because of political liberalisation.

Disputes continue to occur despite the existence of conciliation and collective bargaining measures. As a result, in South Africa July and August have become known as the strike season.[39] We can predict at the beginning of the year that there is going to be an increase in industrial action as a result of a number of factors including a downward pressure on wages.

The focus of this article is not the rise in industrial action on the consequences of frequent strikes. I argue that labour liberalisation[40] increases strikes in education. An educator's strike has a severe

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36 Patel, E (ed). 1994. *Worker rights. From apartheid to democracy. What role for organised labour?*, p. 22. Kenwyn: Juta.

37 Govender, L. 1996. *When the chalks are down. A historical, political and social interpretation of teacher militancy in South Africa*, p.56. Pretoria: Human Sciences Research Council.

38 Jayriya, E. 1999. Most labour disputes occurred in the Western Cape. *The Star*, Wednesday September 8, p. 8.

39 Msomi, S. 1999. Employers, trade unions rapped over knuckles. *Sunday Times Business Times*, September 12, p. 1.

40 Labour liberalisation refers to labour rights accorded to educators as in section 23 of the Constitution Act 108 of 1996. This section provides that:

Labour relations

23. (1) Everyone has the right to fair labour practices.

(2) Every worker has the right –

(a) to form and join a trade union

(b) to participate in the activities and programmes of a trade union; and

(c) to strike

(3) Every employer has the right

(a) to form and join an employers' organisation; and

human cost which unfortunately has little influence on government decisions. It also tends to be unpopular and is often regarded as unacceptable by public opinion.[41] Strikes in education do not inflict an economic loss as in the private sector, but rather human cost in the form of e.g. a high failure rate.[42] The employer is not directly hurt. A harm is inflicted on the innocent child, but not the employer – a party who is not even contemplated in the labour relations.

I will substantiate my argument with data drawn from primary and secondary sources. From these sources I will draw illustrations on concepts such as unfair labour practices, the right to strike and conclude by indicating how a balance between collective rights and individuals rights can be attained.

Conceptualisation

Labour liberalisation should be understood as a contradictory process which presents both dangers and opportunities for the trade union movement.[43] On the one hand, it exposes trade unions to public scrutiny especially when a *post mortem* is done on matric (school leaving) results. Educators are often criticised and blamed for high failure rates. They are accused of being selfish by concentrating on their conditions of service. On the other hand, it creates opportunities for educators to exercise rights which they did not have to fight for in the past, including the right to strike.[44] The right to strike as provided in the Labour Relations Act (LRA) No. 66 of 1995 section 64 creates a dilemma and imbalance when

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(b) to participate in the activities and programmes of an employers' organisation

(4) every trade union and every employers' organisation has the right –
  (a) to determined its own administration, programmes and activities;
  (b) to organise; and
  (c) to form and join a federation.

(5) Every trade union, employer's organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements.

41 Prinsloo, JG. 1998. Power sharing in education: dilemmas and implications for schools. In: De Groof, J, Bray, E, Mothata, S & Malherbe, R (eds). *Power sharing in education: dilemmas and implications for schools*, p. 76. Amersfoort: Acco.

42 Taunyane, LM. 1998. South Africa can not afford the cost of matriculation failures. *City Press*, February 8, p. 17.

43 Buhlungu, S. 2000. A question of power. Co-determination and trade union capacity. In Adler G (ed) *Engaging the state and business. The labour movement and co-determination in contemporary South Africa*, p. 180. Johannesburg: Witwatersrand University Press.

44 Wood, G. 1998. *Trade union recognition. Cornerstone of the new South African employment relations*, p. 71. Johannesburg: Thomson Publishing.

applied in education. Although the Act provides for lock-outs (section 67) and replacement labour (section 76), very little is done during strikes to continue rendering education to learners. The child's right to education is infringed. In fact it is provided in section 29(1) of the constitution that:

29(1) Everyone has the right –

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

The question here is whether, by allowing educators to strike, the state is making education available and accessible. The exercise of the right to education requires by implication the existence and maintenance of a minimum of education. The right to (basic) education is not qualified and accordingly the state will have less discretion in refusing to make education available. Closing down public schools during strikes which has the effect of depriving people (learners) of a basic education *prima* facie constitutes an infringement of this right and requires justification in terms of section 36 of the Constitution.[45]

Thus, the right to strike in education infringes the learner's right to basic education. The right to strike can be categorised as a subjective right.[46] The fundamental premise of the doctrine of subjective rights is that wrongfulness consists of the infringement of a subjective right. All legal subjects (educators and learners) are holders of subjective rights. The holder of a subjective right has a right over something enforceable against other people. This indicates the dual relationship that characterises every right. There is a relationship between the holder of a right and all other persons. This is a subject – subject relationship.

This relationship implies that the holder of a right may enforce his powers over a legal object against all other legal subjects and that, as a corollary, a duty rests on all other legal subjects not to infringe the relationship between the holder of a right and the object of his right. Thus every right has a corresponding duty. Given the unequal powers that employers and employees have, subjective rights arise to recognise employees' interests as being worthy of protection. This explanation suffices for now I will return to it later.

The right to strike

The potential of a conflict exists within any social structure. Generally the use of industrial action (strikes) within the employee relations system is an explicit, collective expression of both concern and power. It is intended to help secure a more favourable outcome to a negotiation or to resist

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45 Davis, D, Cheadle,H & Hayson, N. 1997. *Fundamental rights in the Constitution. Commentary and cases*. Kenwyn: Juta.

46 Neethling, J, Potgieter, JM & Visser, PJ. 1999. *Law of delict*, p. 49. 3rd ed. Durban: Butterworths.

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unacceptable employer's action.[47] Its power derives from the capacity to create a situation of temporary disorder within the employment relationship and by so doing, prevents even the most enlightened managerial regime from becoming mere paternalism. However, it appears that the use of strikes may be an intolerable abuse of economic freedom and type of warfare which allows some groups to make gains at the expense of others.

Strikes[48] are ostensibly incompatible with the best interests of the child.[49] Strike may cause a breakdown of the trust between educator and learner. Strikes are indicative of an imbalance in this relationship and a neglect of obligations. Nowhere is the concept of the child's best interests consonant with strikes. The legislation that the government created in the area of the child's best interests is generally projected as being in the "in the public interest"[50] and therefore if some action is stated to be "unlawful" then, by implication, it is also morally wrong and people become socialised into accepting it as such. The question arises as to whether educators have a right to strike. A strike is designed to cause harm to an employer and often causes harm to individual educators who are not or do not wish to be involved in the dispute, and learners who are not party to the employment relationship.

In South Africa there is reluctance to call the freedom to strike a right because of the nature and consequences of a strike. Strikes force others to do what they do not want to do.[51] Certainly by granting employees and trade unions "immunity" from legal action when undertaking a "lawful" industrial action implies that it is a privilege – not granted to other groups in the society – rather than a right, and, as such, the right may be withdrawn if it is not exercised in a responsible manner. Strikes should be acceptable to the government as the guardian of national interests and therefore the child's best interests. This the government does by restricting the scope of immunity, by narrowing the boundary of lawful strikes and tightening procedural requirements. The government has also widened the range of interested parties who can instigate legal action against trade unions not just to include

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47 Hollinshead, G, Nochols, P & Tailby, S. (eds). 1999. *Employee relations*, pp. 199-200. London: Pitman Publishing.

48 The concept strike means, according to section 213 of the LRA, partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed b the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.

49 De Waal, E, Theron, T & Robinson, G. 2001. An education law analysis of the learner's best interests. *Perspectives in Education*, Vol. 19(4):151-161

50 Pepin, L. 1990. Teachers' trade union rights. *International Labour Review*, 59-61.

51 Du Plessis, JV, Fouché, MA, Jordaan, B & Van Wyk, MW. 1994. *A practical guide to Labour Law*, p. 298. Pretoria: Digma.

management or trade union members but also a private citizen who feels she or he might be affected by the industrial action.[52]

Remedies

Essential service

Given public disapproval of strikes in education, education should be declared an essential service. According to section 213 of the LRA an essential service means:

(a) a service the interruption of which endangers the life, personal safety or health of the whole or part of the population.

The reference to Parliamentary service and the South African Police Services in the above section is acceptable. However, the above category must be debated and interpreted. It is not quite clear why the Essential Services Committee does not include education in the list of designated essential services.[53] If education is declared an essential service, it would mean that educators will not be able to strike but would have to follow a particular procedure (section 74 of the LRA) to resolve disputes.

Collective bargaining

The LRA provides a wide range of dispute resolution structures.[54] These structures help in reducing strikes by providing justice in labour matters. However, in recent years collective bargaining has lost credibility because of unilateral implementation of decisions on conditions of service.[55] This attitude

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52 Rautenbach, F. 1999. *Liberating South African labour from the law*, 91-94. Cape Town: Tafelberg.

53 Basson, A, Christianson, M, Garbers, C, Le Roux, PAK, Mischke, C & Strydom, EML. 1998. *Essential Labour Law*, Vol. 2. Groenkloof: Labour Law Publications. This volume lists in pp. 114-115 designated essential service to include: air traffic control and regulations; Weather Bureau of the Department of Environmental Affairs and Tourism; Municipal Traffic and Policing services; Municipal Health Services; Municipal Security Services, the supply and distribution of water; the generation, transmission and distribution of electricity; fire fighting; services for the functioning of courts; correctional services and blood transfusion services.

54 Anderson, F & Van Wyk, J. 1997. *Labour Law in action. A hands-on guide to the LRA*, pp. 54-55. Manzini: Macmillan Press. The structures include: bargaining councils, Commission for Conciliation Mediation and Arbitration, the Labour Court and the Labour Appeal Court.

55 Maile, S. 1999. Policy implementation: the rise of trade unionism in education. A paper presented at the South African Education Law and Policy Association International Conference, Bloemfontein.

affected the credibility of collective bargaining. Collective agreements are not implemented as agreed in the bargaining councils.[56]

Collective misconduct

One of the most important labour law controversies in the 1990s was whether employers were entitled to take disciplinary action on an individual basis against employees who participated in illegal strikes (and so-called "stay-away" or "mass action" absences) or whether discipline had to be imposed collectively. The individual approach took the form of charging employees guilty of embarking on an illegal strike with disciplinary offences such as "unauthorised absence from work" or "absence without permission". Some form of disciplinary enquiry would then be held on an individual basis and an appropriate disciplinary penalty would be imposed on each individual employee.[57] The principles of progressive discipline would be applied. This means that if the employee had a clean disciplinary record, a sanction short of dismissal would be imposed. This includes a warning or even a final written warning. However, if an employee had received previous warnings for absence without permission or similar offences, and if these warnings were still valid, the principles of progressive discipline would mean that a more severe sanction would be imposed in the case of that employee – often dismissal.

CONCLUSION

The right to strike has some limitations. It is based on statutory procedures. Although educators have the right to strike, striking should be used as a last resort when all dispute resolution measures are exhausted. I have established that strikes in education do not often inflict as much harm on the employer (the department of education) as on the child. It infringes the child's right to education, thus the right to strike is categorised as a subjective right. I also discussed the remedies to this problem. They include declaring education an essential service and the effective use of collective bargaining and collective misconduct (dismissal).

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56 Legotlo, W. 1998. Collective bargaining in the Education Sector: Legal dilemmas. A paper presented in SAELPA conference, 1998, pp. 4-5. Legotlo indicates that there is failure to implement agreements on the right sizing of educators, post provisioning scales, salary and appraisals. Collective bargaining is characterised by bad faith and ineffective communication.

57 Le Roux, PAK. 2000. Mass action, strikes and lockouts: A review of some important cases. *Contemporary Labour Law*, Vol. 9(7):61-65 (February 2000). Annotations – cases include: *National Union of Mineworkers and Others v Free State Consolidated Gold Mine (Operations) Ltd* (1995) 16 ILJ 1371 (A) and *SACTWU and others v Novel Spinners (Pty) LTd* (1999) II BLLR 1157 (LC); *FAWU and others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LACT); *Chauke and others v Lee Service Centre CC +/a Lesson Motors* (1998) 19 ILJ 1441 (LAC). Also see Le Roux, PAK. 2001. Dismissal for collective misconduct. A matter of evidence. *Contemporary Labour Law* Vol 11(2):11-15 (September 2001).

C FREEDOM OF EXPRESSION

Introduction

For many years children were not only seen as minors who lacked iudicium (judgement) but as human beings without any iudicium. This in fact led to the infringement of many of their rights as human beings.

Legislation

The fundamental rights of children in South Africa are protected under section 28 of the Constitution of the Republic of South Africa, Act 108 of 1996 (CRSA). It would be an infringement of this right and a degradation to view the child (a person under the age of 18[58]) as having no iudicium and therefore no right to expression. In addressing the learner as a human being with dignity,[59] we should also consider his/her point of view or opinion in matters concerning him/her. Children have the right to speak out on matters (freedom of expression[60]) as well as being consulted for example learners should be consulted before finalizing the code of Conduct for Learners.[61]

In defining the concept of expression it is also necessary to focus on the choice of the word "expression". "Expression" is a wider concept than 'speech' and includes activities such as painting and sculpting, displaying posters, dancing and the publication of photographs. Symbolic acts such as flag burning, the wearing of certain items of clothing and physical gestures amalgamate under the right to freedom of expression.

Children as minors need to be guided in the school situation to execute not only their fundamental rights but also to deal with their obligations and responsibilities in a democracy.

A democracy needs critical thinking

The public school, as education mentor for children (learners) in a democracy, becomes the forum where the children are guided to adulthood and guided to fulfil their place in a democratic society.

After establishing our new democracy in 1994, it was necessary to change the school methodology in order to develop citizens' skills for participation in a democracy. The old curriculum was based on the retention of information and theory. Since the South African government was aware of the importance

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58 Section 28(g)(i) of CRSA.

59 Section 10 of CRSA.

60 Section 16 of CRSA.

61 Section 8(1) of the South African Schools Act, Act 84 of 1996(SASA).

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to develop critical thinking, education methodology has changed from one that was educator centred to one that is learner centred. This new curriculum should *be skills-orientated and applicable in practice. One of the outcomes of this new methodology is per* se to develop critical thinking.[62]

A prerequisite for critical thinking

It is necessary to enhance and respect freedom of expression in order to develop and encourage critical and independent thinking. Freedom of expression creates a market place of ideas[63] and ensures individual development and self-fulfilment[64] Therefore De Waal *et al.* (2001:310) argue that the denial of this right would be inhuman because it is an essential human activity to express oneself.

An internationally protected right

The importance of the right to freedom of expression as a pillar of democracy is clear when one sees that this right is protected in all of the major international human rights instruments.

The freedoms of expression, opinion and information are also protected in article 19 of the Universal Declaration of Human Rights (UDHR) of 1948, which is a clear indication that freedom of expression is a fundamental right.[65]

Limiting this right

As is the case with all fundamental rights, the right to freedom of expression is not absolute and must be balanced against other freedoms and rights. According to Rautenbach and Malherbe (1999: 345) all rights can be limited "under specific circumstances and in a particular way for the protection of some public interest or the rights of other." So it was also agreed upon at the Sixth International Symposium on the European Human Rights Convention and Freedom of Expression "that no democratic society has yet removed the obstacle to full freedom of expression, and it is improbable that any will do so in the near future.[66]

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62 **Cape Argus**. 1997:8.

63 Abrams v United States 250 US 616 (1919).

64 Clayton, R. and Tomlinson, H. 2001. **Privacy and freedom of expression**. London: Oxford, p 112; De Waal, J, Currie, I, and Erasmus, G. 2001. **The Bill of Rights Handbook.** Cape Town: Juta, p 310.

65 Türk, D and Joinet, L. 1999. The right to freedom of opinion and expression: Current problems of its realizaton and measures necessary for its strengthening and promotion. In: Coliver, S (ed.). **Striking the balance. Hate speech, freedom of espression and mom-discrimination**. London: University of Essex, p 37.

66 Türk and Joiner, p 37.

Looking at two critical South African incidents, we indicate that the intention of the protection of this fundamental right is not clear when implementing it at school level. This right is still infringed upon and not balanced to enhance the new democracy.

Conclusion

The right to freedom of expression cannot be absolute. It can be limited when it is reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom. Secondly it can be limited according to its inherent limitations.[67]

Recommendations

School managers and SGB's must create a forum for the right to freedom of expression on all levels of learner participation. Learners need to have a say in the choice of curriculum as well as extra-curricular activities. A forum should be developed where every learner can speak out against the Code of Conduct or other matters at school. Before any decision is made, learners should have a say e.g. on matters as school policies; cultural and sport activities. A policy should also be developed to reflect learners' expressions on matters e.g. in school/learners' newspapers.

This point of view of learners on any matter should then by means of learner representation be discussed in the SGB[68] and changed if necessary according to the changing views and values of a society. SGB's must learn to accept the fact that to differ in opinion is not negative but an enrichment of adulthood in a democracy. When a learner differs from an educator or the principal on good and reasonable grounds, it is only the issue that is at stake. The authority or respect is not questioned if this is the case. Freedom of expression should be used to help develop positive critical thinking.

D RELIGION

The right to freedom of religion, belief and opinion

The protection of human rights in South Africa and in particular the impact of the Bill of Rights on social change cannot properly be assessed without reference to other factors and mechanisms that influence this objective.

First, the new constitutional order cannot be separated from the apartheid past. The Preamble to the Constitution states that the people of South Africa recognise the injustices of the past, honour those who suffered for justice and freedom, and adopt the Constitution to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

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[67] See section 36 of CRSA.
[68] School Governing Body elected and constituted in terms of SASA. The SGB comprises among others learners in grades 10 –12.

The right to freedom of conscience, religion, thought, belief and opinion in section 15(1) has important implications for education. The right protects one's beliefs, but also one's right to promote, teach and manifest those beliefs.[69] Included in the right is also the right to join others in manifesting one's beliefs.[70] The question is how this right is exercised in the educational environment.

Section 15(2) deals specifically with the manifestation of one's religious convictions in state or state-aided institutions, such as schools. It provides that religious observances may be conducted at state or state-aided institutions, provided that such observances follow rules made by the appropriate authorities, are conducted on an equitable basis, and attendance are free and voluntary.

Section 15(2) distinguishes South Africa from the American position, where the so-called establishment clause has led to a situation where all forms of religious observances have been banned from public institutions like schools.[71] As a matter of fact, the Constitutional Court has held that the South African Constitution rejects the strict wall of separation doctrine found in the United States.[72]

Religion and education in the United States of America

The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition of forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lessons of history that were and are the inspiration for the Establishment Clause, the lessons that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce

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[69] Malherbe, EFJ. 1998. Die grondwetlike beskerming van godsdiensvryheid in ***TSAR,*** 680.

[70] This aspect of the right is covered by section 18, which provides for the freedom of association, but even more expressly by section 31, which provides *inter alia* that members of a religious community may practise their religion together with other members of that community.

[71] See eg Chandler *et al.* 1999. *Constitutional Law Deskbook: Individual Rights* , 90 ff; Witte J and Green "The American constitutional experiment in religious human rights: the perennial search for principles" in Van der Vyver JD and Witte J (eds) *Religious Human Rights in Global Perspective* (1996) 497ff; Van der Vyver JD "Introduction" in Van der Vyver and Witte xi-xlvii; Witte J "The South African experiment in religious human rights" 1993 *Journal for Juridical Science* 1ff; Valente *Law in the Schools* (1980) 109ff; Underkuffler-Freund LS "Religious guarantees in a pluralistic society: values, problems and limits" 1997 *SA Public Law* 32ff.

[72] *S v Lawrence; S v Negal; S v Solberg* 1997 10 BCLR 1348 (CC) paras 100-102, 116-118.

Constitutionality of voluntary religious instruction in public schools[73]

The concept of public schools' releasing children during the school day in order that they may receive religious instruction has taken several forms in practice. One such program was challenged before the Supreme Court of the United States in 1948.[74] In Champaign, Illinois, interested members of Jewish, Roman Catholic, and Protestant faiths formed a voluntary association and obtained board of education approval of a cooperative plan to offer religious classes.

Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend. Classes were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher grades. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.

The Supreme Court by a vote of eight-to-one invalidated the program. The Court pointed out that not only were the tax-supported public school buildings being used for the dissemination of religious doctrine, but that the state also afforded sectarian groups an invaluable aid in that it helped to provide pupils for their religious classes through use of the state's compulsory education machinery. "This is not separation of Church and State."

Four years later the constitutionality of a different type of "released time" program was considered by the Supreme Court.[75] A New York statute, as implemented by regulations of the state commissioner of education, expressly provided for the release of public school pupils from public school attendance to attend religious classes off school premises. Those who contested the New York plan contended that it was not basically different from the Champaign plan. Their key argument was that the weight and influence of the school was used to support a program of religious instruction because records were kept of attendance of pupils released to attend religious classes, regular classes were halted during the period of "released time," and pupils not attending such classes were required to remain in school.

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[73] People of State of Illinois ex rel. McCollum v. Board of Educ. of School dist. no. 71, Champaign County. 1948 Supreme Court of the united states, 1948.333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649.

[74]People of State of Illinois ex rel. McCollum v. Board of Educ. of School Dist. No. 71, Champaign County, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

[75]Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

By a vote of six-to-three the validity of the plan was sustained. The majority reasoned that the state can "accommodate" the religious wishes of parents to the extent of releasing pupils at parental request at a specified time. That school buildings were not used for the religious instruction was a crucial difference from the Champaign case. The majority commented that the problem, like many in constitutional law, was one of degree, here degree of "separation of Church and State." Analogy was made between this arrangement and excuses accepted for student absences for religious reasons.

Bible reading

In 1963, in an eight-to-one decision, the Court found Bible reading to be in violation of the establishment clause of the First Amendment (made applicable to the states by the Fourteenth Amendment).[76] The Court took the occasion to extensively document the point that in barring this exercise as part of the school program it was not deviating from its established precedents in the area of church-state-education relationships. It ruled that the Bible was a sectarian document, a point which had been the subject of considerable litigation in state courts over the years with varying holdings. The Court stated that the First Amendment and its subsequent interpretations indicated that there should be a neutrality of the state in regard to religious matters. This neutrality was based on the premises that the government could not aid any or all religions and that every person has a right to choose a personal course with reference to religion free of any compulsion from the state. The Court observed that it had consistently held that the clause of the First Amendment regarding religion withdrew from government all legislative power respecting religious belief or the expression thereof.

Prayers

The legality of prayers in the public schools was argued in many courts with differing results before the Supreme Court decided a case on the subject in 1962. Most of the cases involved prayers as part of a school's opening exercises, often in combination with Bible reading. The first prayer case to be accepted by the Supreme Court was from New York and involved use of a specially written prayer designed to inculcate "moral and spiritual" values and purported to be non-sectarian.[77] The prayer was composed by state educational authorities (the Board of Regents) and suggested for use by local school boards. A local school board then required that the so-called Regents' prayer be said in its classrooms; however, any pupil could be excused on his parent's objection.

Dress code for teachers

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[76]School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

[77]Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

The Supreme Court of Oregon, in a case involving a teacher who had become a Sikh and thereafter wore white clothes and a white turban while teaching, held that the teacher was subject to a state legislative ban on religious dress while performing teaching duties.[78] The court said that the prohibition would not apply to incidental elements such as a cross or Star of David, nor to ethnic or cultural dress. In 1987 the Supreme Court dismissed her appeal "for want of a substantial federal question," thereby enhancing the precedential stature of the case.

The Third Circuit relied heavily on the preceding case in ruling against a female Muslim teacher who adhered to the religious conviction that she should, when in public, cover her entire body except face and hands.[79] She filed an unsuccessful discrimination in employment suit when the Philadelphia school district applied the old Pennsylvania statute on the subject that had been upheld eight decades before.

Religion and education in the South African situation

Section 15(2) of the South African Constitution allows state involvement in religious matters and corresponds with the traditional South African approach to religious freedom in terms of which the state has always been actively involved in the creation of favourable conditions for the exercise of religious freedom (without favouring a particular religion as may have been the case previously, because that would be inconsistent either with section 29(2) or section 9).

However, the provision refers to religious observances and not instruction. Religious instruction is subject to section 15 and should such religious instruction impose any kind of limitation on the religious freedom of the individual (for example, by imposing neutrality, or by offending the religious convictions of some learners), such limitation must comply with the limitation provisions in sections 36 of CRSA as well as with section 15(2).

A further implication is that religious instruction which, in terms of ordinary law, has to include a study of the various religions of South Africa, may still, as part of the exercise of the right to religious freedom, be presented from the point of view of a particular religion. Once again, the only condition in educational context is that this should be done equitably, free and voluntary.

The conditions under which religious observances may be conducted in schools are significant, because it protects learners who, in the context of the particular institution, adhere to minority religions, or learners without any religious convictions.

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[78]Cooper v. Eugene School Dist. No. 4J, 301 Or. 358, 723 P.2d 298 (1986), app. dism. 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 (1987).

[79]United States v. Board of Educ. for School Dist. of Philadelphia, 911 F.2d 882 (3 Cir.1990).

- Firstly, the observances must follow the rules made by the relevant authorities, which, according to the SA Schools Act, refers to the governing bodies of schools.[80] Such rules may only regulate religious observances and may not prohibit them. The conduct of religious observances also does not depend on the issue of such rules and in the absence of rules one would still be entitled to conduct such observances. Otherwise, a governing body of a school could effectively thwart the exercise of this right by simply failing to make the relevant rules.
- Secondly, religious observances must be conducted on an equitable basis. This does not mean neutrality as in the United States,[81] but requires the governing body to ensure that one religion is not put at an advantage or disadvantage *vis-à-vis* others. Of course, the preferences of pupils are decisive and it would not make much sense if a religion not practised at a particular school receives similar attention and opportunity as others.
- It would not be a solution to ban religion from schools simply because equity does not seem easy to attain. Apart from being directly inconsistent with section 15(2), it would be a cop-out and would simply switch around any unfairness that may exist to those who do wish to conduct religious observances. Every institution simply has to devise mechanisms and procedures that will ensure that this right can be exercised as fairly as possible within the context of the particular institution.
- Finally, attendance at religious observances must be free and voluntary. Nobody may be coerced in attending them, either directly or indirectly. Teachers may not be compelled to lead such observances or participate in them. Pastors and other representatives of churches may lead observances, as long as a particular church is not favoured or prejudiced in the context of the particular school. Once more, the preferences of those desiring religious observances should be the determining factor.

It should be emphasised that section 15(2) accords constitutional protection to religious observances in educational institutions. It does not endorse any form of religious neutrality as in the United States. Neutrality would be inconsistent with section 15(2). All it does is to prescribe the conditions that religious observances shall be equitable, free and voluntary. For the same reason, the Constitution does not prohibit a school from subscribing to a particular religious ethos, as long as it is equitable, free and voluntary so that learners with other convictions are not disadvantaged.

The South African Constitution versus the political ideology

The South African education system before 1994 was based on what was incorrectly called the Christian-National Education ideology.[82] The majority of schools in South Africa still follow the practices of Christian education by reading from the Bible and saying prayers during assemblies,

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[80] S 7.

[81] See O'Regan J in *S v Lawrence; S v Negal; S v Solberg* (n 231) para 116.

[82] The National Education Policy Act, 39 0f 1967 actually referred to education which has a Christian character and a national character. The concepts Christian and national were not linked in a hyphenated word.

graduation ceremonies and other school-related activities. South African people are in general very religious people.[83]

Despite the clear provisions in the Constitution and the South African Schools Act, Act 84 of 1996, the Department of Education has been revising its policy on religion in schools for more than two years now. Jewish, Christian and Muslim religious observances was allowed in school hours in accordance with the ethos of the school and as long as they remain optional, non-sectarian and non-discriminatory.

The new education policy document[84] [85] drafted by the Department of Education demands that assemblies should not be used as "occasions for religious observance". Thus, no prayer, reflections, music or any particular religious practice at all may be exercised even where all educators and all learners would be in favour of it. The policy imposes a compulsory and exclusive multi-faith approach to religion on schools. It states that teaching " a world of religious diversity" would encourage learners to think in terms of a new national unity in South Africa. Existing teachers in religion will have to undergo "significant retraining" before they will be allowed to teach religion. This policy conflict with section 15 of CRSA and is likely to create tension between the Department and those schools that will have to discontinue certain practices.

While many European countries have been privatising schools by handing them over to churches and religious communities, South Africa's Minister of Education is following the opposite trend. Minister Kader Asmal, Minister of Education, revised the religious policy without meaningful public consultation. Religious communities, educational bodies, parents, and stakeholders were largely excluded in the drafting of the policy.

South African schools are in dire need of case law to guide education policy makers and educators in the interpretation and implementation of section 15 of our comprehensive Constitution. We live in an age in which a just society is sought, not only through democratic constitutional institutions, mechanisms and processes, as important and indispensable as they may be, but in particular through the constitutional protection of human rights. In South Africa we envy Americans' access to the many court rulings that have addressed cases on this subject.

The religious liberty protected by the Constitution is abridged when the State affirmatively forces a particular ideology such as multi-religious learning onto religious communities.

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[83] In terms of the latest census more than 70% of South Africans are practising Christians.
[84] Department of Education, 2001. Religious Policy

[85] See De Villiers, New ideology in school religion. **Dispatch on line**. 24 October 2001

CONCLUSION

South Africa has gone a long way towards implementing the provisions and principles of CRSA. Opportunities to exercise rights and freedoms equally have increased. Tensions still exist between provision and access to them. The tensions are likely to remain for a long time and creative solutions are required.

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